

Before the
Federal Communications Commission
Washington, D.C.

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JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Revision of the Commission's Rules)	CC Docket No. 94-102
To Ensure Compatibility with)	RM-8143
Enhanced 911 Emergency Calling Systems)	
)	
Request for an Emergency Declaratory)	
Ruling Regarding Wireless Enhanced)	DA 98-1504
911 Rulemaking Proceeding)	

To: Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION AND CLARIFICATION

OMNIPOINT COMMUNICATIONS, INC.

Mark J. O'Connor
Teresa S. Werner

Piper & Marbury L.L.P.
1200 19th Street, N.W., Seventh Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

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Introduction and Summary

Omnipoint Communications, Inc. ("OCI" or "Omnipoint"), by its attorneys and pursuant to Section 1.106 of the Commission's rules, files this petition for reconsideration and clarification of the Wireless Telecommunications Bureau's Declaratory Ruling¹ in the above-captioned proceeding. As discussed below, Omnipoint believes that the Declaratory Ruling is inconsistent with law and policy on several grounds: (a) the decision is contrary to the Commission's rules² and orders³ because it imposes massive

¹ Declaratory Ruling, DA 98-2572 (rel. Dec. 18, 1998) (the "Declaratory Ruling").

² 47 C.F.R. § 20.18(f) (Phase I and II wireless E911 obligations apply to a covered carrier "only if . . . a mechanism for recovering the costs of the [E911] service is in place.").

E911 liability costs on the wireless carriers without any reimbursement or recovery mechanism; (b) the decision imposes an unfair burden on wireless carriers while wireline carriers benefit from state immunization and indemnification protections; and (c) the decision offends the Commission's policies of lifting regulatory burdens for greater wireless competition.

On reconsideration, Omnipoint asks the Bureau to clarify that state authorities requesting E911 compliance by wireless carriers must provide "a mechanism for recovering the costs of the [E911] service" that includes the carrier's *liability costs* associated with E911.⁴ Consistent with the Commission's E911 First Order, the state's mechanism for recovery of such costs, of course, can be left to the States. Omnipoint can envision different state mechanisms, including state indemnification for E911 liability or an explicit state limitation on E911 liability. However, a state mechanism providing for *no protection* for wireless carriers from E911 liability and offering *no ability* to recover the insurance liability costs would fail the Commission's requirement for a cost recovery mechanism.

Omnipoint notes that state-by-state immunity or insurance cost recovery for E911 is not a panacea for the liability issue; however, no state immunity and no ability to recover E911 costs is far, far worse. Indeed, without some address of this issue by either the States or the Commission, the program of E911 is extremely unsuitable for wireless

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³ Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 18676 (1996) ("E911 First Order"), and, Memorandum Opinion and Order, 12 FCC Rcd. 22665 (1997) ("E911 Reconsideration Order"), *recon. pending*.

⁴ Omnipoint stresses that, in its view, a cost recovery mechanism is necessary to cover the incremental insurance costs associated with providing enhanced 911.

carriers that are trying to meet the Commission's E911 goals. As the Bureau is well aware, Omnipoint and other wireless carriers have implored the Commission to adopt within its federal E911 framework a provision that includes reasonable nationwide immunization from liability. Such a nationwide solution would be far more suitable for wireless carriers than state-by-state plans, especially when a single wireless system can encompass multiple states and a single mobile E911 callers can pass from one state to another. Further, as the Bureau is also aware, the problem of liability is especially troublesome for wireless carriers that must pass 911 calls from mobile nonsubscribers with whom the carrier has no contractual relationship and no method of charging. As explained below, however, the Declaratory Ruling takes these matters toward an even more unworkable regulatory framework by suggesting that wireless carrier liability need not even be addressed by the State cost recovery mechanisms.

Discussion

The Declaratory Ruling reached two conclusions on wireless E911 obligations that have a direct and material impact on Omnipoint and other covered wireless carriers. The Bureau first concluded that a covered carrier is obligated to deploy E911 service even where the state statute provides no immunity from liability for E911 services. The Bureau reasoned that the E911 obligation was not specifically conditioned on "whether the state affords the carrier some degree of legal immunity from liability." Id., at ¶ 9.

Second, the Bureau decided that a wireless carrier with no statutory or contractual immunity must implement E911 services, even if the state does not compensate for the costs of E911 liability insurance. The Bureau reasoned that the "approach to E911 cost recovery does not support a conclusion that any particular cost item, such as liability insurance, must be recovered in a specific manner, such as State

reimbursement,” and so “it is at least premature to conclude that reimbursement of liability insurance should be considered a requirement . . . to satisfy the general cost recovery conditions.” Id., at ¶ 16. Additionally, the Bureau reasoned that recovery for E911 liability insurance was unnecessary because: increased liability due to E911 (as opposed to non-enhanced 911) “is less clear” and insurance costs for such risks “may be minimal;” carriers may be able to file state or federal informational tariffs to limit liability; carriers may be able to limit liability contractually with their customers; carriers may be able to recover costs by raising their rates.

Omnipoint respectfully submits that these two conclusions, taken together, contradict the Commission’s rule that states implement “a mechanism for recovering the costs of the [E911] service,” and contravene a number of significant policies.

I. Wireless Carriers Have No E911 Obligation Unless State Cost Recovery Plans Affirmatively Address E911 Liability In A Reasonable Manner.

Section 20.18(f) of the Commission’s rules was adopted on “the fundamental notion that carriers must be able to recover their costs of providing E911 service,” and that “resolving cost recovery issues is a prerequisite to E911 deployment.”⁵ The additional cost due to liability for E911 service is, in Omnipoint’s experience, a real and

⁵ E911 First Order, at para. 89.

enormous cost -- the additional liability associated with the additional Phase I and Phase II E911 services is not at all “unclear” or “minimal.”⁶

Taking the two decisions of the Declaratory Ruling collectively, however, one could conclude that these costs are not within the ambit of the state cost recovery mechanism required under Section 20.18(f). While the Declaratory Ruling is careful to avoid this conclusion explicitly, it does unfortunately reach the same result by first rejecting state immunity or insurance cost recovery and then positing “alternative” recovery mechanisms (*i.e.*, informational tariffs, contractual limitations, self-insurance) which are, in fact, wholly ineffectual. Omnipoint believes this conclusion contravenes the express provisions of Section 20.18(f). Omnipoint believes that the Bureau should clarify that, where no state immunity or insurance cost recovery is available, the State mechanism for cost recovery *must* include *affirmative and reasonable* alternative recovery mechanism(s) that meet the carrier’s legitimate costs of providing E911 service.

Omnipoint respectfully submits that, in many cases and in many States, the “alternatives” suggested in the Declaratory Ruling provide wireless carriers with no adequate assurance of cost recovery. States relying on such “alternatives” should, in Omnipoint’s view, affirmatively show that such cost recovery would be effective in their State as part of the reasonableness of the cost recovery mechanism. Specifically, the

⁶ The California 9-1-1 Program Manager, for example, asserted that the cost of insurance would be “at least \$50 million annually for statewide, commercial

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Bureau suggests that wireless carriers can limit their liability by tariff or contract, or by purchasing additional insurance to cover the costs of implementing an E911 system. Omnipoint requests Bureau guidance on how wireless carriers can adequately recover their costs, as required under the Commission's rules, when none of these options are viable. Although some States may have effective means of recovering costs, this may not be the case in all States.

In its Declaratory Ruling, the Bureau references the approach taken in California as described in the Los Angeles Cellular Telephone case;⁷ the Bureau characterizes the California situation as a PUC obligation on wireless carriers to file informational tariffs which may include a limitation on tort liability. Omnipoint opposes this suggested “alternative” on several grounds. First, the Los Angeles Cellular Telephone case is of questionable application to PCS operators, since the court specifically held that the preemption of Section 332 of the Communications Act did not apply in that case due to the fact that the case arose before the effective date of the federal law.⁸ Today, it is unclear whether Section 332 would preempt the State law, which calls for informational tariffs and state regulation of CMRS. Second, while Omnipoint does not object to PUC

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reimbursement to wireless carriers for the insurance aspect only.” Letter of Leah A. Senitte to Chairman William Kennard, at 2 (July 20, 1998).

⁷ Los Angeles Cellular Telephone Company v. Superior Court of Los Angeles, 76 Cal.Rprt.2d 894 (Cal.Ct.App., 1998).

⁸ Id. at n.3

orders limiting CMRS carriers' E911 liability, a limitation that takes the form of state informational tariffs or other state regulation (i.e., filing of CPCN's) impinges on the preemption of Section 332 and needlessly adds to the morass of regulation faced by wireless carriers.⁹ Finally, while it is uncertain whether the Los Angeles Cellular Telephone case would protect PCS operators today, it is even more specious to reason that wireless operators in other states may be entitled to similar state PUC protections.

In New York and Pennsylvania, for example, federal and state regulations have restricted the state Commissions' ability to regulate CMRS providers. Specifically, federal preemption over CMRS rates and entry, 47 U.S.C. § 332(c)(3), and state amendments creating an exception to the Pennsylvania Commission's jurisdiction over CMRS carriers have effectively precluded the Pennsylvania Commission's regulation of CMRS carriers and their activities.¹⁰ Similarly, in New York, the Public Service Commission ("PSC") lacks jurisdiction over one-way paging, two-way mobile radio, or cellular telephone service.¹¹ Thus, it is questionable whether the New York or Pennsylvania PUC could limit a wireless carrier's liability. Additionally, while New

⁹ Moreover, Section 20.15(c) of the Commission's rules, 47 C.F.R. § 20.15(c), would seem to preclude CMRS carriers from filing tariffs at the federal level. Omnipoint would have no objection, of course, to filing a limited federal tariff for the purpose of defining its E911 service and limiting liability in a reasonable manner, if the Bureau were to permit and enforce such a tariff.

¹⁰ In Re Omnibus Budget Reconciliation Act of 1993, 1998 WL 842357 (Pa. P.U.C.).

York has implemented a Targeted Accessibility Fund ("TAF") to subsidize the costs of universal service, E911, and TRS, that fund is not available to wireless carriers.¹² Thus, state PUC limitations on liability, or for cost recovery, in many of Omnipoint's most critical systems are simply not provided for by State law.

The Declaratory Ruling (at ¶ 20) also suggests that carriers may limit their liability for E911 calls through contractual provisions with customers. However, the wireless carrier must transmit E911 calls from any caller, whether or not the carrier is in privity with the caller.¹³ In Omnipoint's view, it is flatly inconsistent with federal law to force the wireless carrier to bear the costs of E911 calls from non-customers – the mandate to offer such global access to E911 service must be funded from the public agencies requiring such a public service.¹⁴ In addition, roamers on Omnipoint's network

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¹¹ NY Pub. Serv. §§ 5(5) and 5(6).

¹² Opinion and Order Establishing Access Charges For New York Telephone Company and Instituting A Targeting Accessibility Fund, Case No. 28425, 1998 WL 518159, * 20, *21 (N.Y.P.S.C. 1998) ("the exception as to cost recovery of E911 wireless costs from the TAF is denied").

¹³ See, E911 Reconsideration Order at ¶ 140 (because "covered carriers are required to transmit 911 calls from all handsets regardless of subscription," a carrier might "attempt" to subject use of its network to only those that agree to terms and conditions of service). Omnipoint is not aware of how to "attempt" this limitation on its GSM network, nor is it clear whether such a limitation would effectively limit E911 liability.

¹⁴ GSM operators, in particular, also face significant issues of technical capability to forward necessary E911 data from non-initialized users of its network. As the Commission is aware, ANI data for a user of a wireless GSM-based system is not created until after the user calls the carrier to initialize service and obtain a unique

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that are customers of other GSM operators have no direct contractual relationship with Omnipoint. It is unclear to Omnipoint how a limitation on E911 liability agreed to between two carriers would have the effect of limiting the roamer's state rights as against Omnipoint.¹⁵

Beyond these "alternatives," the Declaratory Ruling suggests that cost recovery is possible through the carrier's ability to self-insure or to "adjust . . . rates to reflect . . . changes in costs." Declaratory Ruling, at ¶ 19. However, these recovery alternatives are not a "state mechanism" designed to compensate for the carrier's E911 costs. Quite plainly, these "alternatives" could force the carrier itself to shoulder the entire burden of the E911 service without any state recovery mechanism while that carrier suffers competitive consequences for raising rates, in direct contradiction to Section 20.18(f). In fact, the Bureau's suggestion that carriers pay the costs themselves through service rate increases adds significant uncertainty as to the meaning of the Section 20.18(f) condition for the implementation of a cost recovery mechanism. Cf., E911 First Order at ¶¶ 85-88 (discussion of proposed "state funding methods" included "public appropriations or bond

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MSISDN. A user with a non-initialized handset who dials "911" prior to that initialization will have no associated ANI data.

¹⁵ Moreover, New York case law suggests that telecommunications carriers would not be able to limit their liability contractually. See, Denmark v. New York Telephone Company, 411 NYS2d 506 (1978), *rev'd on other grounds*, ("in the case of telephone services, consumer is confronted with a contract of adhesion which makes no provision whereby a subscriber may purchase additional protection against negligence, and because of this, a telephone company's limitation on liability is invalid.")

issues” or separate state 911 tax; the proposals leading to adoption of Section 20.18(f) contemplated an affirmative state cost recovery mechanism).

In sum, Omnipoint believes that the Declaratory Ruling leads to a dangerous and confusing conclusion: E911 obligations apply even in the absence of state immunity or limitations, without any state plan for reimbursement of liability insurance, and without any reliable contractual limitation. This result is, of course, contrary to Section 20.18(f), which we urge the Bureau to clarify. In the meantime, it is Omnipoint’s concern that the Declaratory Ruling may impede progress toward reasonable cooperation between the wireless industry and State representatives.

II. The Declaratory Ruling Conflicts With Significant Commission Policy Objectives and Threatens A Constitutional Taking Of Wireless Carriers’ Systems With No Just Compensation.

As Omnipoint discussed above, the Declaratory Ruling concludes that covered wireless carriers may be left with enormous E911 liability for which the State is apparently not obligated to address or reconcile in any fashion in its cost recovery mechanism. If such an interpretation of Section 20.18(f) is possible (and Omnipoint believes it is not), then it is completely unreasonable and at odds with Congressional and Commission policies to: (a) encourage rapid deployment of wireless services; (b) encourage wireless competition with wireline services, (c) nullify and preempt state laws favoring wireline incumbents by precluding or impeding new entrant competition. Moreover, serious Fifth Amendment and due process issues are raised if licensees, who have paid auction fees for licenses, are now obliged to dedicate system capacity without compensation in the name of implementing the unfunded goals of E911.

Omnipoint strongly believes that wireless E911 is a socially vital service that should be implemented in a reasonable and timely manner. Wireless E911 is an important tool in meeting the public goals behind Good Samaritan laws, crime reporting, and reporting drunk and reckless driving. However, wireless carriers cannot afford to underwrite the social costs that come with the benefits of wireless E911 service. The liability of even a single dropped 911 call can thwart the Commission and Congressional CMRS objectives by forcing carriers to over-build their networks with massive additional site and equipment costs paid through higher consumer prices. Such actions contradict the policy for rapid deployment of wireless services,¹⁶ as carriers avoid all but the most lucrative markets.

Further, the discriminatory nature of state immunity laws, which cover wireline but not wireless carriers, also appear to violate the regulatory parity principles of Section 253(b) of the Communications Act. The Commission has previously held that “state law is not competitively neutral under Section 253(b) if it ‘significantly affects’ the ability of one class of providers to compete in the market by substantially rais[ing] the costs and other burdens . . . , thus deterring the entry of potential competitors.”¹⁷ Likewise, the Commission has found that state laws subjecting carriers to significant disparity violate

¹⁶ Second Report and Order, GN Dkt. No. 90-314, 8 FCC Rcd. 7700, 7732 (1993).

¹⁷ See New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd. 19713, 5 Communications Reg (P&F) 625, 630 (1996).

“the requirement of competitive neutrality [of Section 253(b)] and undermine the pro-competitive purposes of the 1996 Act.”¹⁸ Ultimately, this discrimination undercuts the fundamental objectives of the 1993 Omnibus Budget Reconciliation Act and the Telecommunications Act of 1996 by impeding the pace of wireless price competition with wireline local exchange carriers and, in some cases, adding incremental costs that would preclude wireless market entry altogether.

It is inconsistent with the principles of competition and regulatory parity to force wireless carriers to assume unlimited liability when States have historically held wireline carriers immune from the same liability. Public policy dictates that carriers should not be forced to both serve the public with emergency service and then assume the massive risk of liability for carrying out that public service. Omnipoint requests clarification that the state immunity policies that shield their wireline competitors should equally apply to wireless carriers. Until such time, E911 service deployment will undoubtedly suffer.

Omnipoint also believes that the principle of immunizing carriers from E911 liability¹⁹ or reimbursing carriers for such costs is consonant with the Constitutional Fifth Amendment principle that the Government may not take property, even for laudable government purposes, without providing just compensation. If wireless carriers,

¹⁸ *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order*, 12 FCC Rcd. 15639, 15658 (1997).

however, are forced to provide capacity on their systems without compensation for *unfunded* E911 services, the principles of Constitutional takings are affronted. The case against unfunded E911 is particularly compelling for licensees such as Omnipoint that pay auction-related fees for use of the spectrum, have invested hundreds of millions of dollars into system deployment, and now operate in highly competitive markets. For such carriers, there was never any "quid pro quo" of duopoly licenses and profit margins in return for absorbing the losses incurred from government programs.

While Omnipoint fully accepts its responsibilities to obey lawful Commission regulations and orders, it is not consistent with Fifth Amendment takings principles to force Omnipoint to dedicate its private property for E911 without compensation or to force carriers to accept unfunded E911 mandates.²⁰ It also offends due process for the Bureau to blur and alter the understanding of the E911 compensation scheme and to force unfunded use of wireless carriers' systems only after those carriers have expended enormous funds, with the Commission's blessing, deploying commercial systems.²¹

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¹⁹ See Los Angeles Cellular Tel. v. Sup. Ct., 76 Cal. Rptr. 2d 894 (Cal. 1998) (regulatory obligations bring an "equitable trade-off" that "requires a concomitant limitation on liability" for the provision of E911 service).

²⁰ Mandating use of E911 for all nonsubscribers (see n. 12, above) and without state compensation is another example of an extraordinary taking of the wireless carrier's system without any compensation.

²¹ General Electric Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (As the D.C. Circuit explained, Fifth Amendment due process permits a federal agency to bring a civil or criminal enforcement action against a private party for violation of federal


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Conclusion

Omnipoint shares the Commission's concern for the implementation of E911 services, and for the safety of users of Omnipoint's wireless systems. However, the laudable goals of E911 cannot be imposed on wireless carriers where those carriers are subject to enormous liability and no reasonable mechanism for cost recovery or liability immunity. Competitive PCS operators like Omnipoint simply have no financial ability, and no obligation as a licensee, to assume the *unfunded* mandates of state and federal 911 programs.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By: 
Mark J. O'Connor
Teresa S. Werner

Piper & Marbury L.L.P.
1200 19th Street, N.W., Seventh Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

Date: January 19, 1999

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regulations only "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform. . . ."). See also Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1558 (D.C. Cir. 1987) (same); Radio Athens, Inc. v. FCC, 401 F.2d 398, 401 (D.C. Cir. 1968) (same).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Reconsideration and Clarification was served this 19th day of January 1999, by first class mail, postage prepaid, to the following:

Leah A. Senitte
Telecommunications Division
Department of General Services
State of California
601 Sequoia Pacific Boulevard
Sacramento, Ca 95814-0282

Jim Conran
Ad Hoc Alliance for Public Access to 911
P.O. Box 2346
Orinda, CA 94563

Robert M. Gurss
Wilkes, Artis, Hedrick & Lane, Chrt'd.
Assn. Of Public-Safety Comm. Officials-Int'l., Inc.
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Pamela J. Riley
David A. Gross
AirTouch Communications, Inc.
1818 N Street, N.W.
Washington, D.C. 20036

John Prendergast
Susan J. Bahr
Ameritech Mobile Communications, Inc.
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W.
Washington, D.C. 20037

John T. Scott, III
Bell Atlantic Mobile, Inc.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

William B. Barfield
Jim O. Llewellyn
BellSouth Corporation
1155 Peachtree Street, N.E., Suite 1800
Atlanta, GA 30309-2641

S.C. Wilkins, Chief
Information Management Division
California Highway Patrol
P.O. Box 942898
Sacramento, CA 94298-0001

Michael B. Day
Jeanne M. Bennett
Cellular Carriers Association of California
Goodin, MacBride, Squeri, Schlotz & Ritchi
505 Sansome Street, Suite 900
San Francisco, CA 94111

Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Assn.
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Jay L. Birnbaum
Jennifer P. Brovey
Los Angeles Cellular Telephone Company
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Mary McDermott
Mary E. Madigan
Personal Communications Industry Assn.
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Richard J. Quist, Jr.
Betsy Stover Granger
SBC Wireless, Inc.
4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, CA 94588

Philip L. Verveer
David M. Don
Truposition, Inc.
Wilkie Farr & Gallagher
1155 21st Street, N.W., Suite 600
Washington, D.C. 20036

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Robert S. Foosaner
Lawrence R. Krevor
Nextel Communications, Inc.
1450 G Street, N.W., Suite 425
Washington, D.C. 20005

Caressa D. Bennet
Dorothy E. Cukier
Rural Telecommunications Group
Bennet & Bennet, PLLC
1019 – 19th Street, N.W., Suite 500
Washington, D.C. 20036

Peter M. Connolly
US Cellular Corporation
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

James R. Hobson
NENA
Donelan, Cleary, Wood & Maser PC
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-3935

Sylvia Lesse
Margaret Nyland
The Rural Cellular Association
Kraskin, Lesse & Cosson, LLP
2120 L Street, NW, Suite 520
Washington, DC 20037

Reuven M. Carlyle
XYPOINT Corporation
2825 Eastlake Avenue East, Suite 250
Seattle, WA 98102